UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MONDELĒZ GLOBAL LLC, **Respondent,** **-and-** **BAKERY, CONFECTIONERY, TOBACCO WORKERS AND GRAIN MILLERS INTERNATIONAL UNION, LOCAL 719, AFL-CIO,** **Union.**	**Case Nos. 22-CA-174272, 22-CA-178370, 22-CA-178591, 22-CA-179007, 22-CA-180206, 22-CA-180213, 22-CA-181423, and 22-CA-183609**

RESPONDENT MONDELĒZ GLOBAL LLC'S ANSWERING BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

TABLE OF CONTENTS

Pages(s)

TABLE OF AUTHORITIES

Page(s)

Cases

INTRODUCTION

Pursuant to Section 102.46 of the National Labor Relations Board's ("NLRB" or the "Board") Rules and Regulations, Respondent Mondelēz Global LLC ("MG LLC" or "Respondent" or "Employer") submits this Answering Brief to Counsel for the General Counsel's Exceptions to the January 7, 2019 Decision and Order ("Decision") of Administrative Law Judge ("ALJ") Kenneth W. Chu.[1] As explained herein, the ALJ properly dismissed the General Counsel's Complaint allegation asserting Respondent improperly retained eight trainees during a one-week layoff in April 2016.

In determining which employees to lay off, Respondent interpreted Article 5 of the parties' collective bargaining agreement ("CBA"), which provides, without further detail, that layoffs are to be effectuated in reverse seniority order. (GC Ex. 3 at 8). Respondent laid off 44 of the least senior employees in the unit, opting to retain the eight trainees participating in their second week of orientation – consisting of observing and shadowing production line employees – because they were not engaged in actual production work. Respondent's rationale was supported by the fact that in connection with at least one prior layoff in 2014, the Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 719 ("Union") conceded that trainees in their first week of classroom orientation should not be included on the seniority list for layoff purposes because trainees were not performing productive work.

[1] Although, the ALJ recommended that three of the alleged complaint allegations be dismissed, Counsel for the General Counsel excepted to only one - the dismissal of the charge relating to the April 2016 layoff. Counsel for the General Counsel did not except to the ALJ's conclusion that 1) Respondent did not violate Section 8(d) of the Act when it allegedly ceased to honor employee authorizations for dues deduction; and 2) the 3-day suspension of Nazzaro on about June 13, 2016 was not motivated by Nazzaro's union status and/or his activity in support of the Union. As a result, the Board should adopt these dismissals.

In the proceedings below, Counsel for the General Counsel presented a different interpretation of the CBA: that only employees participating in their first week of training could be spared from a layoff. In light of the conflicting interpretations, the ALJ properly applied the "sound arguable basis" test and found Respondent's reading of the CBA did not violate the Act. As a result, the ALJ rejected Counsel for the General Counsel's contentions, finding instead that: (1) the parties agreed that trainees should be excluded from layoffs because they do not perform productive work; and (2) there was no basis to distinguish trainees' status between their first and second weeks of training.

Counsel for the General Counsel's exceptions incorrectly assert the ALJ erred because "the complaint alleged that the unilateral change violated 8(a)(5), not 8(d)." (GC Br. at 5). This assertion misstates Board law because a complaint lacking an 8(d) element does not preclude an employer from defending an 8(a)(5) allegation by relying upon a "sound arguable basis" defense. Additionally, Counsel for the General Counsel relies upon what appears to be the ALJ's harmless typographical error – a reference to a paragraph in Article 5, Section 1 of the CBA which notes a separate seniority list for employees in the Maintenance and Repair ("M&R") Department, who are not at issue in this case. However, it is clear from the Decision that the ALJ's finding was rooted in Article 5's general directive that layoffs should be effectuated in reverse seniority order.

Accordingly, the Board should affirm the ALJ's recommended dismissal of the Complaint allegation pertaining to the April 2016 layoffs.

FACTS RELEVANT TO THE APRIL 2016 ONE-WEEK LAYOFF

On or about April 11, 2016, Respondent laid-off 44 unit employees for one week. (GC Ex. 15). Article 5 of the expired CBA provides for a plant-wide seniority list for layoffs. (GC Ex. 3 at 8-9). Respondent chose not to lay off eight trainees at this time, who instead continued with their second

week of orientation. Pamela DiStefano, Respondent's Director of Labor Relations, North America, explained that trainees' second week of training is still training – the week consists of observing and shadowing employees on the floor to understand what the position entails. (Tr. 1220:7-15). DiStefano also explained that in 2014, the Union filed, but subsequently withdrew, a grievance concerning Respondent's decision not to layoff trainees under similar circumstances. (Tr. 1187, 1188, 1220; R. Ex. 2.).[2]

Ms. DiStefano's explanation was confirmed by the Union's Business Agent, Stan Milewski, who explained that the second week of training consisted of "shadowing" "alongside those people engaged in doing work." (Tr. 193:17-194:19). Milewski confirmed that, other than the trainees, the employees temporarily laid off in April 2016 were the least senior employees. (Tr. 189:22-190:13). Milewski also acknowledged that CBA's layoff language "never did affect training." (Tr. 105:23-25), and that in 2014 trainees continued classroom orientation while others unit employees were laid off. (Tr. 106:7-22).

THE ALJ'S DECISION

The ALJ properly dismissed the Complaint allegation asserting Respondent's layoff decision violated Section 8(a)(5) of the Act. The ALJ agreed that Respondent had a sound arguable basis for its interpretation of the CBA leading to its decision to not lay-off the trainees. Specifically, the ALJ found that the:

> [P]arties agreed that the premise in retaining new hires while in class-room training during a layoff is because they are not workers engaged in a productive manner. In other words, the new hires were only learning new skills while in a class-room

[2] Counsel for the General Counsel's brief incorrectly stated that Respondent allowed the trainees "to work during a layoff," and Respondent made a decision that the trainees, "should remain working during the layoff." (GC Br. at 4-5). There is simply no record evidence that the trainees engaged in actual work which would or could have been performed by the laid off employees.

> setting. Similarly, when placed on the work floor, these same new hires were still learning new skills, but in a production line setting.
>
> DiStefano credibly testified that the new hires were on the work floor to observe the workers on the production line. There has been no evidence proffered by the General Counsel that the new hires were given a shift schedule or had actually replaced the regular work force on the production line. As such, I find that the Respondent's rationale in identifying the employees to be laid-off as a reasonable and plausible interpretation of the contract. [(D. 11:26-36).]

ARGUMENT

I. THE ALJ'S "SOUND ARGUABLE BASIS" ANALYSIS OF RESPONDENT'S DECISION TO RETAIN TRAINEES DURING A ONE-WEEK LAYOFF WAS ENTIRELY APPROPRIATE

As discussed herein, the ALJ properly dismissed the allegation related to the temporary layoffs.

A. The Sound Arguable Basis Test Is The Proper Standard To Evaluate A Section 8(a)(5) Allegation With A Contractual Defense

Counsel for the General Counsel argues that the ALJ erred in applying the "sound arguable basis" test to dismiss the §8(a)(5) allegation concerning layoffs because the Complaint alleged a unilateral change in violation of Section 8(a)(5) and not a contract modification in violation of Section 8(d) of the Act. (GC Br. at 5).

Counsel for the General Counsel is wrong. The Board routinely applies the "sound arguable basis" standard in a Section 8(a)(5) context when the CBA covers the subject matter of the dispute. When a contract interpretation is presented, the Board will not decide the matter if the company had a "sound arguable basis" for its interpretation and the actions it took pursuant to that interpretation. See NCR Corp., 271 NLRB 1212, 1213 (1984). The resolution of the refusal to bargain charge rests on an interpretation of the contract at issue, "when an employer acts pursuant to a claim of right under the parties' agreement." NLRB v. United States Postal Serv., 8 F.3d 832,

837 (D.C. Cir. 1993). Similarly, in Bath Marine Draftsmen's Ass'n v. NLRB, 475 F.3d 14, 26 (1st Cir. 2007), the United States Court of Appeals for the First Circuit found the "sound arguable basis" standard applies to both §8(d) contract modification claims as well as § 8(a)(5) claims with a contractual defense. Id.

Applying the "sound arguable basis" framework in this context effectuates the purpose of the Act because, "[t]he Board is not the proper forum for parties seeking an interpretation of their collective-bargaining agreement." Vickers, Inc., 153 NLRB 561, 570 (1965)(applying the "sound arguable basis" test when no Section 8(d) violation was alleged). Further, as the Board stated in Consolidated Aircraft Corporation, 47 NLRB 694, 706, enf'd., 141 F. 2d 785 (9th Cir. 1944), "it will not effectuate the policy of 'encouraging the practice and procedure of collective bargaining' for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act."

The above-referenced authority applies with equal force to the present case. Respondent retained eight trainees during a one-week layoff in April 2016 pursuant to its interpretation of Article 5 of the parties' agreement. Because the layoff dispute is one of contract interpretation, contrary to what Counsel for the General Counsel asserts, it is of no legal import that the ALJ may have cited cases concerning Section 8(d) contract modification claims because the legal analysis is the same. As a result, the ALJ's decision in this regard should be affirmed.

B. Respondent Plausibly Interpreted The CBA In Light Of The Past Practice of Retaining Trainees During Layoffs

In finding Respondent presented a "plausible interpretation" of the CBA concerning which employees were subject to the seniority list for layoff purposes, the ALJ correctly relied on Respondent's 2014 decision to retain trainees participating in their first week of orientation. (D.

11:25-30). The "sound arguable basis" analysis applies traditional principles of contract interpretation, including the underlying contractual language in question as well as relevant extrinsic evidence, such as the parties' past practice. Knollwood Country Club, 365 NLRB No. 22, slip op. at 3 (2017); American Electric Power, 362 NLRB No. 92, slip op. at 1, 3 (2015) (sound arguable basis found when employer's interpretation was supported by past practice); Mining Specialists, Inc., 314 NLRB 268, 268-269 (1994).

In excepting to the ALJ's decision, Counsel for the General Counsel attempts to distinguish between classroom trainees (excepted from layoff) and floor trainees (claimed not to be excepted from layoff) without any basis or supporting evidence. The ALJ correctly identified Respondent's clear motivation behind its decision to retain trainees in each layoff was that they could not and did not in fact perform productive work precisely because they were trainees. (D. 11:26-27; Tr. 193:17-194:19; 1220:7-15). Thus, how Respondent approached the 2014 layoff, and how the Union responded (i.e. a withdrawn grievance), further supported Respondent's "sound arguable basis" defense in connection with the April 2016 layoff. (Tr. 1187:8-1188:13, 1220; R. Ex. 2). While the Union and the Company may have had different interpretations of the CBA, it is not for the Board to determine which interpretation was the "correct" one.[3] As a result, the ALJ's findings in this regard should be affirmed.

II. THE ALJ'S RELIANCE ON ARTICLE 5 OF THE CBA WAS PROPER REGARDLESS OF THE DECISION'S SPECIFIC REFERENCE TO M&R EMPLOYEES

The ALJ's reference to the M&R Department was, at worst, a harmless error because Article 5, which the ALJ correctly identified, still refers to plant-wide seniority for purposes of

[3] In any event, the Board should not serve as the arbiter of disputes arising under the parties' expired CBA. To do so, would circumvent the general rule against requiring an employer to arbitrate post-expiration grievances. See Litton Financial Printing v. NLRB, 501 U.S. 190, 205 (1991) and Nolde Bros. v. Bakery & Confectionery Workers Local 358, 430 U.S. 243 (1977).

layoffs. (GC Ex. 3 at 8-9). The record testimony makes clear that Respondent and the Union were referencing the first paragraph of Article 5, Section 1 of the CBA, which provides that employees shall have plant-wide seniority. (GC Ex. 3 at 8). In fact, Milewski testified that the alleged unilateral change concerning layoffs was in contravention of "the first paragraph of Section 1 of Article 5." (Tr. 191:16-17). As such, the ALJ's analysis of Article 5 would be the same in the event of a layoff of M&R employees or any other department referenced in Article 5 because layoffs are to occur in reverse order of seniority. (GC Ex. 3 at 8-9; D. 10:4-5). Accordingly, Counsel for the General Counsel's reliance on what amounts to, at most, a non-substantive error is nothing more than a red herring. Therefore, the ALJ properly found that Respondent's decision to retain trainees during a one-week layoff so that those trainees could complete their training was a sound arguable application of the parties' CBA. As a result, the Board should deny Counsel for the General Counsel's exception with respect to this finding.

* * *

CONCLUSION

For the foregoing reasons, the Board should reject Counsel for the General Counsel's exceptions and adopt the ALJ's Decision and Recommended Order with respect to the following Conclusions of Law:

The Respondent did not violate Section 8(a)(3) and (1) of the Act when it suspended Richard Nazzaro for 3 days on about June 13, 2016.

The Respondent did not violate Section 8(a)(5) and (1) of the Act when it on about April 2016, selected employees for layoffs who were not the most junior employees.

The Respondent did not violate Section 8(d) of the Act when it allegedly ceased to honor employee authorizations for dues deduction in and after May 2016.

Respectfully submitted,

By: /s Philip B. Rosen

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Dated: May 3, 2019

CERTIFICATE OF SERVICE

The undersigned affirms that on May 3, 2019, Respondent's Brief in Opposition to Counsel for the General Counsel's Exceptions to Administrative Law Judge Kenneth W. Chu Decision was filed with the National Labor Relations Board using the e-filing system at www.nlrb.gov, and that copies were served on the following individuals by electronic mail:

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